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No. 99-1625

Supreme Court, U.S.
FILED
MAY 1 1 2009
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IN THE

Supreme Court of the United States

TANGIPAHOA PARISH BOARD OF EDUCATION; E.F. BAILEY; ROBERT CAVES; MAXINE DIXON; LEROY HART; RUTH WATSON; DONNIE WILLIAMS, SR.; ART ZIESKE, in their capacities as members of the School Board; TED CASON, in his capacity as Superintendent of Schools,

Petitioners,

v.

HERB FREILER; SAM SMITH, individually and in his capacity as administrator of the estate of his minor child, Steven Smith; JOHN JONES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

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Petitioners respectfully reply to the Respondents' Brief in Opposition ("Oppos.") to the School Board's petition for a writ of certiorari. In an exaggerated manner, the Respondents distort the factual record in this case seeking to distract this Court from the plain language of the disclaimer and the myriad of reasons supporting this Court's review of this case.

Respondents begin with a misleading and inaccurate reading of the disclaimer itself. Contrary to Respondents' suggestion, the disclaimer does not "instruct students not to believe their science teachers and the state-mandated curriculum," nor does it instruct students "to adhere to religious interpretations of life's origins." Oppos. at 1. Neither does the disclaimer encourage "students to adhere to the Biblical version of creation," *id.* at i, or "impose upon schoolchildren a religiously-based and doctrinal interpretation of life's origins." *Id.* at 1. Instead, the disclaimer advises students that evolution should be taught, and encourages critical thinking on the complicated issue of life's origin. In the text of the disclaimer itself, the Board expressly acknowledges each student's right to form opinions *or* maintain beliefs about life's origin, notwithstanding the intention of the school system to teach only evolution. This is not religious indoctrination, as the Respondents suggest; the disclaimer is instead the School Board's effort to render the classroom a more comfortable environment for all students to learn, including those students whose views about life's origin may differ from the lesson presented to them. In an era when "political correctness" is being challenged as an inauthentic substitute for genuine pluralism in our country, a school board may surely be allowed to avoid the imposition of official orthodoxy by encouraging students to think critically about controversial ideas and to form their own conclusions about them. That is what the disclaimer at issue in this case does.

I. RESPONDENTS MISCHARACTERIZE THE FIFTH CIRCUIT'S LEGAL DECISION AS FACT-BASED TO DISTRACT THIS COURT FROM THE PLAIN LANGUAGE OF THE DISCLAIMER.

The issue presented in this case is whether the disclaimer, which has never been read, endorses religion or has the primary effect of advancing religion. None of the alleged "facts" recited by Respondents is relevant to this issue. The only facts that *are* relevant are the words of the disclaimer itself. In particular, as was recognized by Judge Barksdale and the other dissenters from the Fifth Circuit's en banc denial, the apparently determinative "fact" for the panel was the disclaimer's mention of the Bible. Petitioners have demonstrated in their Petition that this illustrative reference to the Bible cannot render unconstitutional a disclaimer the Fifth Circuit observed would otherwise be constitutional. Petition at 15-16.

This case should turn on the wording of the disclaimer, not the motives that may have impelled some of the members of the School Board to vote in favor of it. Thus, this Court should not be distracted by Respondents' detour into the irrelevant. In a passing reference, Respondents note their belief that the Fifth Circuit erred in holding that the disclaimer satisfied the "purpose" prong of the *Lemon* test, Oppos. at 10 n.7, but they did not preserve this issue for further review since they failed to file timely a cross-petition for a writ of certiorari. Accordingly, the constitutionality of the disclaimer's purposes is now a part of the law of the case, and Petitioners' belated effort to insinuate the issue is both untimely and irrelevant.

Nonetheless, Petitioners are compelled to correct any misimpression that may have been left by the Respondents' distorted recitation of the context leading up to the disclaimer's adoption by the Board.[1] From the outset of this case, Respondents have sought

[1] Respondents claim that the Petition misstates the factual context of the disclaimer "in several material respects," Oppos. at 2, but they fail to point specifically to a single factual misstatement in the Petition. (Cont'd)

to lump together two distinct events — namely, the enactment of the disclaimer and what Respondents have been wont to describe incorrectly as an "unsuccessful attempt to have 'religious materials' — including a full-blown 'Creation Science' curriculum — introduced into the schools." Oppos. at 2. If relevant at all to this case, the religious materials inquiry goes to demonstrate that this case is *not* a rerun of *Edwards v. Aguillard*, 482 U.S. 578, 107 S. Ct. 2573 (1987), but was a genuine effort to apply the teachings of this Court concerning religion in public schools to the specific circumstances of Tangipahoa Parish. Viewed in this light, the outcome of the inquiry actually reinforces the constitutionality of the disclaimer. The Board acted in full cognizance of this Court's ruling in *Aguillard*, and it did nothing to challenge or undermine that ruling. Contrary to the vague impression left by Respondents, the Board did not adopt any resolution rejecting the teaching of evolution in its school curriculum.

Instead, responding to inquiries and requests of constituents, the School Board in the fall of 1993 explored the adoption of a policy to "clarify the use of, and conditions under which religious materials and discussions on religion may be included in the curriculum and in student activities on public school property."[2] The effort was broadly directed, addressing (1) the prohibition against the school system's promotion and disparagement of religious belief or nonbelief,[3] (2) the study of religious materials and religion as a part of a secular program

(Cont'd)
By contrast, all of the facts related in the Petition and this Reply Brief are set forth in the stipulated record and the documents incorporated therein.

[2] *Policy on the Inclusion of Religious Materials and Discussion on Religion in the Curriculum and in Student Activities* (Record at 1502).

[3] *Id.* (citing *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 89 S. Ct. 733 (1969)).

of education,[4] (3) the study of theories of the origin of mankind,[5] (4) class discussions and activities related to holiday observances,[6] (5) the free speech rights of students to discuss and to distribute religious material,[7] (6) graduation ceremony prayer,[8] and (7) student meetings for purposes of religious, political and philosophical discussion and study.[9] Even a cursory review of the School Board's deliberate examination of the legal and educational considerations for a policy reveals that the Board, far from acting improvidently and in dereliction of constitutional limitations, paid careful heed to the guidance provided by our courts. Notably, the Board's religious materials inquiry paralleled a similar initiative by the Departments of Justice and Education, at President Clinton's urging, "to provide school officials with guidance [concerning] the extent to which religious expression and activities are permitted in public schools."[10]

[4] *Id.* (citing *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 83 S. Ct. 1560 (1963); *Stone v. Graham*, 449 U.S. 42, 101 S. Ct. 192 (1980); and *Aguillard*).

[5] *Id.* (citing *Aguillard).*

[6] *Id.* (citing *Widmar v. Vincent*, 454 U.S. 263, 102 S. Ct. 269 (1981)).

[7] *Id.* at 2 (citing various district court decisions pre-dating *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 115 S. Ct. 2510 (1995)).

[8] *Id.* (citing *Jones v. Clear Creek Independent School Dist.*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993), and steering clear of policy elements subsequently declared unconstitutional in *Doe v. Duncanville Ind. School Dist.*, 70 F.3d 402 (5th Cir. 1995), and *Ingebretsen v. Jackson Public School Dist.*, 88 F.3d 274 (5th Cir.), *cert. denied*, 117 S. Ct. 388 (1996)).

[9] *Id.* (citing the Equal Access Act, 20 U.S.C. §§ 4071-4074).

[10] *Duncanville*, 70 F.3d at 409 n.1 (Jones, J., concurring) (quoting News Release of U.S. Dep't of Education, Aug. 17, 1995). *See* Record at 1536 (copy of the News Release, including letter of Secretary Riley and statement of principles); Record at 1514 (President Clinton's speech regarding "religious expression in public schools").

The religious materials inquiry in Tangipahoa Parish largely eventuated in the policy of clarification which was its goal.[11] Only the paragraph concerning the study of theories about life's origin sparked any extended discussion.[12] Paragraph 3 of the initial policy draft[13] and paragraph 3 of the revised policy draft[14]

[11] *See* Minutes of Education/Curriculum Committee Meeting, Feb. 21, 1994 (Record at 1521) (items 1, 2, 4, 5 and 6 forwarded to Board for approval with item 7 omitted because already covered under Equal Access Act); Minutes of School Board Meeting, Mar. 1, 1994 (Record at1525) (approving items 1, 2, 4 and 5). *See also* App. C to the Petition, at 39a-40a.

[12] Viewpoints on various sides of this topic, including those of creation science advocates as well as rigid evolutionists, were voiced at public meetings held by the Education/Curriculum Committee concerning the broader inquiry regarding religious materials in the schools. *See* Minutes of Education/Curriculum Committee Meeting, Dec. 15, 1993 (Record at 1508); Minutes of Education/Curriculum Committee, Feb. 21, 1994 (Record at 1521). At the December 15, 1993 meeting, the lead plaintiff in this case aired his views generally "that religious beliefs [should] be taught in church or . . . home." However, Mr. Freiler went further to deride religious belief, asking "to know when the meeting on Elvis sightings would be forthcoming," and he encouraged "an objective religion course in schools" to "discuss how man created God or the evolution of religion." (Record at 1508, p. 6.) *See also* Transcript (Record at 1471) (where Mr. Freiler refers to "the tremendous amusement value of" religion). Such derision points further to the need in this controversial area for a policy like the disclaimer that recognizes everyone's right to believe or not to believe as their conscience or faith leads them, without fear of ridicule or of contravening an institutionalized orthodoxy of belief on this topic.

[13] Paragraph 3 of the initial policy draft reads: "The study of a variety of theories about the origin of mankind may be included if done with the clear secular intent of enhancing the effectiveness of science instruction." *Policy on the Inclusion of Religious Materials* (Record at 1502) (citing *Aguillard* itself).

[14] Paragraph 3 of the revised policy draft reads: "Although the Tangipahoa Parish School Board recognizes that it cannot promote nor condone the teaching of Creation Science or any other religion-based theory of the origin of man, there is no prohibition on any student conducting individual, voluntary studies of these topics." *Revised Draft of Policy* (Record at 1519).

addressed study of theories of the origin of man. In each instance, the draft policies took pains to comply carefully with *Aguillard*.[15] And, most importantly, in the end, the School Board *declined to adopt any paragraph clarifying the teaching of theories about life's origin* — an action that itself should be the best evidence of the Board's intent to avoid constitutional infirmity.

The disclaimer was proposed and adopted to assuage the concerns voiced by students and parents about the incongruity they perceived between their own beliefs about life's origin and what is taught in school. Thus, the motives for the disclaimer's adoption are both political and pedagogical. To ensure that the school audience understood that adherence to other concepts of life's origin other than evolution would not render them second-class citizens in the school community, the Board deemed it essential to include the illustrative phrase, "the Biblical version of creation." Given the tenor of the message, the illustration was critical to sending the community the message that the School Board was disavowing official governmental orthodoxy in precisely the same sense in which this Court expressly did so in the second flag salute case. *See West Virginia State Board of Ed. v. Barnette*, 319 U.S. 624, 640-42, 63 S. Ct. 1178, 1186-87 (1943).

That message is evident from the text of the disclaimer. But to emphasize how far the courts below strayed from the text, one need go no farther than the Respondents' quotation of the district court that "during the discussion of the proposed resolution, no Board member stated that the reason the disclaimer was being introduced was to urge students to exercise their critical thinking skills or to examine all alternatives when forming opinions . . ." Oppos. at 5. Of course, discussion was unnecessary on this point since the text of the disclaimer itself explicitly urges students "to exercise critical thinking and gather

[15] The district court thus erred in suggesting that the draft policy and revised draft "allow[ed] the teaching of Creation Science," App. C to Petition at 39a, especially in view of the express language of the revised draft. *See supra* note 14.

all information possible and closely examine each alternative toward forming an opinion." Petition at 2. The first place a court should go to identify the reasons for a statute's adoption is the text of the statute itself.

Respondents urge that the dissent from the en banc denial wrongly concluded that the disclaimer was adopted to "advance tolerance and respect for diverse viewpoints," because a large percentage of the community was purportedly Christian. Oppos. at 5. Respondents fail to appreciate that the school curriculum is perceived by some within this number to be at odds with their beliefs about life's origin. From this perspective, the disclaimer advances tolerance and respect for those with such viewpoints by disclaiming the notion that, in teaching only evolution, the School Board was endorsing an evolution-only orthodoxy. In this sense, diversity is advanced by addressing the voiced concerns of adherents to viewpoints (even if those of a majority) otherwise excluded in the school community.

II. THIS COURT SHOULD GRANT THE WRIT.

A. This Case Is Of Exceptional Importance.

Anyone familiar with the American experience of teaching evolution in public schools, from *Scopes* to *Aguillard*, fully appreciates the exceptional nature of this case. This controversy shows no signs of waning, certainly so long as the concerns of certain parents and schoolchildren are perceived as being frustrated or left unaddressed. While several states and local school authorities use or have attempted to use disclaimers to address the controversy,[16] other jurisdictions have employed

[16] *See, e.g.*, Marlantes, *The Evolution of a Controversy*, Christ. Sci. Monitor, Dec. 23, 1999, at 14 (noting adoption by Oklahoma officials of textbook disclaimer akin to disclaimer in force in Alabama since 1995); *Evolution Falls From Curriculum*, N. Orleans Times-Picayune, Aug. 12, 1999 (describing disclaimer appended to biology textbooks in Alabama, which states, in part, that evolution is "a controversial theory some scientists present as a scientific explanation for the origin of living things. . . . No one was present when life first appeared on earth. Therefore, any statement about life's origins should be considered as theory, not fact. . . .").

other means, some of which arguably depreciate the importance of evolution in the educational curriculum.[17] While no two cases are likely to present a precise identity of facts (the mistaken standard for certiorari urged by Respondents), recent actions across the country demonstrate that the controversy at the core of this case has been and will continue to be addressed by means akin to the disclaimer, under circumstances similar to those present in this case. Hence, this case affords this Court an historic opportunity to help quell the controversy by holding that the disclaimer at issue comports with the Constitution.

The issue presented in this case — an application of the endorsement and "effects" tests to a 173-word disclaimer — is not fact intensive, and the decisions of the courts below were not fact-driven. To suggest otherwise (as do Respondents) underscores the inescapable importance of correcting the manner in which federal courts apply these tests to legislative acts challenged on their face, rather than as applied.

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[17] *See* Petition at 9 n.9 (collecting articles recounting the Kansas State Board of Education's elimination last year of evolution from statewide standardized testing); Henry, *Teach evolution as science*, USA Today, Mar. 13, 2000, at 11D (noting Kentucky's recent deletion of the word "evolution" from state science guidelines, substituting the phrase "change over time"); *Poll: Americans Accept Evolution and Creationism*, N. Orleans Times-Picayune, Mar. 11, 2000, at A16 (recounting recent action at charter school in Rochester, New York, and protests over including evolution in curriculum guidelines in Ohio); Gibeaut, *Evolution of a Controversy*, 85 A.B.A.J. 50 (Nov. 1999); *Kansas Eliminates Evolution From Public School Curriculum*, Wash. Post, Aug. 12, 1999, at A13 (referencing attempts in Alabama, Arizona, Georgia and Nebraska "to eliminate evolution in public schools"); *Evolution Falls From Curriculum*, N. Orleans Times-Picayune, Aug. 12, 1999 (referencing changes concerning evolution's place in curriculum enacted or proposed in Alabama, New Mexico, Nebraska, Texas, Ohio, Washington, New Hampshire and Tennessee).

B. To Avoid Repetition, The Fifth Circuit's Erroneous Application of the Endorsement Test and *Lemon's* "Effects" Prong Should Be Corrected.

That the Fifth Circuit erred in its application of the endorsement test and the "effects" prong to the disclaimer at issue is demonstrated in the Petition. Petitioners note only that this Court should grant review to correct this error now, so that other courts will not resort to the "effects" prong as a means of striking down other governmental acts that have never been implemented, are imbued with permissible, secular purposes, and are unlikely to have any effect of advancing or endorsing religion.

C. The Decision Below Stands In Conflict With Interpretations Of The "Effects" Prong By This Court, Other Circuits, And The Fifth Circuit Itself.

Petitioners have reviewed the manner in which the Fifth Circuit's application of the "effects" prong in this case conflicts with decisions of this Court, other Circuits, and the Fifth Circuit itself. Petition at 22-24. Petitioners observe here only that this case is easily distinguished from the cases cited by Respondents in their Opposition, which cases involved a ban on the teaching of evolution, *see Epperson v. Arkansas*, 393 U.S. 97, 89 S. Ct. 266 (1968), balancing the teaching of evolution with the teaching of creation science, *see Aguillard*, a teacher's refusal to teach evolution on grounds of his personal, religious beliefs, *see Peloza v. Capistrano Unified School Dist*, 37 F.3d 517 (9th Cir. 1994), *cert. denied*, 515 U.S. 1173 (1995), and a teacher's insistence on teaching creationism. *See Helland v. South Bend Community School Corp.*, 93 F.3d 327 (7th Cir. 1996), *cert. denied*, 519 U.S. 1092 (1997); *Webster v. New Lenox School Dist*, 917 F.2d 1004 (7th Cir. 1990). In contrast to these cases, the disclaimer at issue recites the School Board's conviction that evolution *should* be taught, and it does not require or condone the teaching of creationism. The disclaimer merely acknowledges that students may adhere to "other concepts" about life's origin without sacrificing their standing in the school community.

Respondents mischaracterize this case as the latest in a line of anti-evolution cases, merely because it deals with the issue of teaching evolution in public schools. Thus, Respondents paint the religious materials inquiry as a conspiracy to introduce creation science into the public school curriculum, and the disclaimer as a step toward this end. But the disclaimer contains no reference whatsoever to creation science, and the religious materials inquiry simply involved the School Board's efforts to clarify legitimate issues that had also caught the attention of the highest levels of the federal government. *See supra* at 3-6.

Aguillard does not stand for the proposition that evolution must be taught as the official orthodoxy of the state on the issue of life's origin. Instead, *Aguillard* holds that religion may not be advanced by banning evolution or, alternatively, requiring the teaching of a religious theory. The disclaimer does neither. Thus, the disclaimer is not "anti-evolution" at all, but reinforces the teaching of evolution in the public school curriculum, while clarifying that the government has no business imposing an official orthodoxy upon those who either decline to accept evolution, or who wish to harmonize it with "other concepts" of life's origin. Evolution is not discredited, but, in teaching it, religious or other beliefs are not intended to be disparaged; religious alternatives are not proposed, but the school system does disclaim its intent to impose a single, orthodox view of life's origin on its students. The Establishment Clause is not and should not be made an impediment to a school board's attempt to make all schoolchildren feel welcome in the school community.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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